RECORD AND BRIEFS.

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No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., AND JACK C. PHILLIPS, *Petitioners*,

v.

COLORADO CIVIL RIGHTS COMMISSION, CHARLIE CRAIG, AND DAVID MULLINS, *Respondents*.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF *AMICI CURIAE* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, COLORADO CATHOLIC CONFERENCE, CATHOLIC BAR ASSOCIATION, CATHOLIC MEDICAL ASSOCIATION, NATIONAL ASSOCIATION OF CATHOLIC NURSES-U.S.A., AND NATIONAL CATHOLIC BIOETHICS CENTER IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Whether applying Colorado's public accommodations law to compel an artist to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

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INTEREST OF THE *AMICI CURIAE*[1]

The United States Conference of Catholic Bishops (USCCB) is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. The USCCB provides a framework and a forum for the Bishops to teach Catholic doctrine, set pastoral directions, and develop policy positions on contemporary social issues. As such, the USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, immigration, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the Conference include the protection of the rights of religious organizations and religious believers under the First Amendment, and the proper development of this Court's jurisprudence in that regard.

The Colorado Catholic Conference (CCC) is the public policy voice of the three Catholic dioceses of Colorado. Basing its mission on the Gospel of Jesus Christ, as particularly expressed in Catholic social teaching and the consistent life ethic, the CCC works with other religious and secular groups in promoting the common good of the people of Colorado, including

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that they authored this brief, in whole, and that no person or entity other than *amici* made a monetary contribution toward the preparation or submission of this brief. In accordance with Rule 37.3(a), all parties have consented to the filing of this brief and their consent letters have been submitted to the Clerk.

the promotion of such basic freedoms as religious exercise and speech.

The Catholic Bar Association (CBA) is a community of legal professionals that educates, organizes, and inspires its members to faithfully uphold and bear witness to the Catholic faith in the study and practice of law. The CBA's mission and purpose include upholding the principles of the Catholic faith in the practice of law, and assisting the Church in the work of communicating Catholic legal principles to the legal profession and society at large. This includes the principles of religious liberty and rights of conscience with respect to religious beliefs as reflected in this nation's founding documents.

The Catholic Medical Association (CMA) has over 2,000 physicians and hundreds of allied health members nationwide. CMA members seek to uphold the principles of the Catholic faith in the science and practice of medicine—including the belief that every person's conscience and religious freedoms should be protected. The CMA's mission includes defending its members' right to follow their conscience and Catholic teaching in their professional work.

The National Association of Catholic Nurses-U.S.A. (NACN-USA) is the national professional organization for Catholic nurses in the United States. A nonprofit group of hundreds of nurses of different backgrounds, the NACN-USA focuses on promoting moral principles of patient advocacy, human dignity, and professional and spiritual development in the integration of faith and health within the Catholic context in nursing.

The National Catholic Bioethics Center (NCBC) is a nonprofit research and educational institute committed to applying the principles of natural moral law, consistent with many traditions including the teachings of the Catholic Church, to ethical issues arising in health care and the life sciences. NCBC is committed to fostering a culture of respect for human life and human dignity, particularly in the medical context.

INTRODUCTION AND SUMMARY OF ARGUMENT

American citizens should never be forced to choose between their religious faith and their right to participate in the public square. This fundamental vision of our constitutional government is embodied in the First Amendment, which guarantees that all citizens, whether of a particular religious faith or no faith at all, are free both to speak and to act in accord with their conscience.

That vision is clearly at risk when government attempts, with increasing intensity, "to reduce religious freedom to mere freedom of worship without guarantees of respect for freedom of conscience."[2] In an apostolic exhortation on the proclamation of the Gospel, Pope Francis recently insisted that "no one can demand that religion should be relegated to the inner sanctum of personal life, without influence on societal and national life, without concerns for the soundness of civil institutions, without a right to offer an opinion on events affecting society."[3] This "right to religious freedom," declared the Second Vatican Council in its *Declaration on Religious Freedom*, "has its foundation in the very dignity of the human person" and is "to be recognized in the constitutional law whereby society is governed" as "a civil right."[4]

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[2] Pope Benedict XVI, Address to the Bishops of the United States of America from Region IV on Their *Ad Limina* Visit (2012).

[3] Pope Francis, *Evangelii Gaudium*, ¶ 183 (2013).

[4] *Dignitatis Humanae*, ¶ 2 (1965).

The First Amendment's text protects religious liberty in two fundamental ways that are at issue in this case. The Free Speech Clause ensures that individuals are not inhibited by the government when speaking in the public square and "prohibit[s] the government from telling people what they must say." *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321, 2327 (2013). This protection means the government cannot force an artist to engage in artistic expression to celebrate a wedding ceremony that she believes violates God's law, nor can it force an artist to celebrate through her expressive activities any President of the United States.

Second, the Free Exercise Clause guarantees every individual the right to seek the truth in religious matters *and then adhere to that truth* through private and public action. Religious liberty flows from the dignity of the human person and finds expression in ways that are social and communicative. Religious exercise thus takes the form of not only individual works, but also actions by religious and religiously motivated secular institutions, including businesses. These acts include, among other things, the many acts of charity that create, maintain, and repair our social fabric: feeding the hungry, clothing the naked, sheltering the homeless, visiting those in prison, and finding permanent families for children without them. And it also takes the form of conducting one's own business in a way that is consistent with one's own religious principles.

This case presents the opportunity to clarify and reaffirm the First Amendment's longstanding protection of religious expression by individuals and institutions, particularly in the public sphere. There is far more at stake in this case than simply whether

Jack Phillips must bake a cake. It is about the freedom to live according to one's religious beliefs in daily life and, in so doing, advance the common good. This Court should reject the temptation that this case presents to severely curtail the exercise of religion—and all its personal and social benefits—outside the four walls of the sanctuary.

STATEMENT

I. The Importance of Religious Liberty

Speaking about an Islamic center planned near Ground Zero in New York, President Barack Obama proclaimed: "This is America. And our commitment to religious freedom must be unshakeable. The principle that people of all faiths are welcome in this country and that they will not be treated differently by their government is essential to who we are."[5] Those words channeled what politicians, judges, preachers, and citizens have celebrated for centuries: America is a country where everyone is free to speak and live according to his or her conscience.

James Madison famously emphasized the importance of religious exercise in responding to a Virginia General Assembly proposal to institute a tax to subsidize Protestant Episcopal teachers:

> "[W]e hold it for a fundamental and undeniable truth, that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence. The Religion then of every man must be left to

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[5] President Barack Obama, *Remarks by the President at Iftar Dinner* (Aug. 13, 2010).

> the conviction and conscience of every man; *and it is the right of every man to exercise it as these may dictate.* This right is in its nature an unalienable right.[6]

The Second Vatican Council conveyed a similar insight in the Declaration on Religious Freedom issued in 1965. "[T]he human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power [such] that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly . . . ."[7] That is because all people are "impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth," which, once known, requires them "to order their whole lives in accord with the demands of truth."[8] It is axiomatic that such action requires "immunity from external coercion as well as psychological freedom."[9]

In other words, an individual "is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows that he is not to be forced to act in a manner contrary to his conscience."[10] "Injury . . . is done to the human person and to the very order established by God for human

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[6] James Madison, *Memorial & Remonstrance Against Religious Assessments*, ¶ 1 (1785) (quotation omitted, emphasis added).

[7] *Dignitatis Humanae*, ¶ 2 (1965).

[8] *Id.*

[9] *Id.*

[10] *Id.* ¶ 3.

life, if the free exercise of religion is denied in society, . . . [and the government] would clearly transgress the limits set to its power, were it to presume to command or inhibit acts that are religious."[11] This freedom is limited only by the demands of "public order," and so must "be respected as far as possible and is not to be curtailed except when and insofar as necessary."[12]

Free speech and free exercise are necessary for the government to honor the dignity of all citizens and allow individual flourishing. These constitutional principles are equally important for societal flourishing because of how much religion contributes to society. As President George Washington pointed out in his *Farewell Address*: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."[13] Indeed, it is easy to forget how much modern society owes to the Catholic Church in particular. The Church created the university system, promoted art, architecture, and the sciences, influenced the development of both western and international law, founded modern economic theory, and fostered the institutionalized care of the poor, orphans, and the sick, including what eventually became the modern hospital system.[14] As will be discussed in more detail

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[11] *Id.*

[12] *Id.* ¶ 7.

[13] *Washington's Farewell Address* (1796), available at https://goo.gl/KmCnTH.

[14] THOMAS E. WOODS, JR., HOW THE CATHOLIC CHURCH BUILT WESTERN CIVILIZATION (2005).

below, intolerance for religious exercise puts at risk not just the individual right to conscience but all these social benefits.

II. Proceedings Below

Jack Phillips is a cake artist who is deeply devoted to his craft but even more so to his faith. He strives to honor God in every aspect of his life, including his business. Pet. App. 281a, ¶ 49. Indeed, it is easy to witness the concrete ways Phillips lives his faith in the commercial world:

- Phillips "believe[s] it is important to treat [his] employees honorably," and so he pays his employees above minimum wage and helps them by loaning or giving them money when they are in need. *Id.* ¶¶ 50–53.
- Phillips' business, Masterpiece Cakeshop, is closed on Sundays "to honor God" and to allow Phillips and his employees to attend church. Neither the business nor its employees will even deliver cakes or baked goods on Sundays. Pet. App. 281a–82a, ¶¶ 54–55.
- Phillips honors the dignity of all individuals by gladly serving all customers regardless of race, faith, sexual orientation, or economic status. Pet. App. 282a, ¶ 56a.
- When Phillips first opened Masterpiece Cakeshop, he gave careful consideration to determining what cakes and products would be created there to ensure that God would be honored through his work. *Id.* ¶¶ 57–58.

- For example, Phillips made the decision not to sell any goods with alcohol in them, including coffee drinks or baked goods that include alcohol. He did not want to lead those with a drinking problem into temptation. Pet. App. 282a–83a, ¶¶ 57–59.
- Phillips also refuses to create cakes that promote anti-American or anti-family themes, a flag-burning or a cake with a hateful message, a KKK celebration of an atrocity against African Americans, an atheist message such as "God is dead" or "there is no God," or even simple vulgarity or profanity on a cake. Though Colorado's statute also protects customers seeking to express these messages as creeds, "the heart-attitude of them does not honor Christ and that is . . . why [Phillips] will not design or create them." Pet. App. 283a, ¶¶ 60–62.
- For the same reason, Phillips will not create or sell Halloween cakes, cookies, brownies, or anything else related specifically to that holiday. Although turning away this lucrative business results in lost revenue, Phillips would rather lose the business than "make a profit on a day that exalts witches, demons and devils." Pet. App. 283a–84a, ¶¶ 63–64.

- Phillips will design and create wedding cakes for the marriage of one man and one woman regardless of their sexual orientation. Conversely, he will not do so for a same-sex wedding, regardless of the couple's sexual orientation. Phillips is not concerned about anyone's orientation. But he believes that celebrating a same-sex marriage violates God's law and "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would [be] a personal endorsement and participation in the ceremony." Pet. App. 284a–85a, ¶¶ 66–67; 287a–88a, ¶ 86.

On July 19, 2012, Respondents Charlie Craig and David Mullins came to Phillips' shop and asked him to make a cake for their wedding. Phillips said he would make their birthday cakes or shower cakes, and he would sell them cookies or brownies, but he could not "make cakes for [a] same sex wedding." Pet. App. 287a, ¶ 79.

Although Phillips "would be pleased to create any other cakes or baked goods for Charlie and David, or any other same-sex couple," Pet. App. 287a–88a, ¶¶ 86–87, the Colorado Civil Rights Commission and the ACLU pursued him for alleged discrimination based on sexual orientation. The Colorado Court of Appeals accepted that Phillips' decision was "*not* because of [his] opposition to [his customers'] sexual orientation." Pet. App. 12a–13a. But it still concluded that by refusing to make the cake, Phillips had somehow denied services "*because of*" sexual orientation. Pet. App. 21a.

The Court of Appeals reached this conclusion based in part on *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015), which the Court read as equating any opposition to same-sex marriage as equivalent to discrimination based on sexual orientation. Pet. App. 16a–17a. In so holding, the Court of Appeals overlooked *Obergefell*'s observation that the belief that marriage is "a union of man and woman" continues to be held by countless religions and people of faith as a "reasonable" conviction based on "decent and honorable . . . premises." 135 S. Ct. at 2594, 2602.

Phillips sought this Court's review, seeking to protect the right of himself and others to respectfully exercise their religious beliefs in their daily lives, not just on Sundays. A ruling upholding Phillips' right to speak and act in accord with his conscience would vindicate the First Amendment and protect a rapidly shrinking American pluralism. People of faith should not be forced to violate their beliefs as a condition of expressing themselves in public or participating in the marketplace.

ARGUMENT

I. Applying the First Amendment in Favor of Petitioners Serves both Individual Rights and the Common Good.

A. The Free Speech Guarantee

"If there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." *W. Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). This Court should hold that the Free Speech Clause protects Phillips from being compelled to use his artistic talents to express a message that violates his deeply held religious beliefs.

1. In *Wooley* v. *Maynard*, 430 U.S. 705 (1977), this Court famously explained how the Free Speech Clause protects an individual's right not to express the government's preferred message. *Wooley* involved a citizen's challenge to a New Hampshire statute making it a crime to obscure the words "Live Free or Die" on the State's license plate. In striking the statute down, this Court reaffirmed that a "system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Id.* at 714 (citing *Barnette*, 319 U.S. at 633–34, 645 (1943) (Murphy, J., concurring)). The "right to speak *and the right to refrain from speaking* are complementary components of the broader concept of 'individual freedom of mind.'" *Id.* (emphasis added). "Government-enforced [speech] inescapably 'dampens the vigor and limits the variety of public debate.'" *Id.* (quoting *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964)).

As for New Hampshire's requirement, the Court said it "required [state citizens to] use their private property as a 'mobile billboard' for the State's ideological message—or suffer a penalty." *Wooley*, 430 U.S. at 715. Such coercive conduct is unconstitutional; the "First Amendment protects the right of individuals to hold a point of view different from the majority, and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." *Id.* In so holding, the *Wooley* Court conceded that New Hampshire had an interest in requiring the license-plate speech: promoting appreciation of state history, individualism, and state pride. But that interest was not sufficiently compelling to justify the regulation. "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id.* at 717.

Since *Wooley*, this Court has consistently recognized that laws compelling speech are "subject to exacting First Amendment scrutiny." *Riley* v. *Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 798 (1988) (government cannot "dictate the content of speech absent compelling necessity, and then, only by means precisely tailored"); *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 642 (1994) ("laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as laws regulating speech based on content). And the Court has recognized that states may not apply public-accommodation laws to compel or interfere with expression. *E.g.*, *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640 (2000); *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

Given the Colorado Court of Appeals' reasoning here, the State's action cannot be construed as anything other than compelled speech. As the Court of Appeals recognized, Phillips' unwillingness to create a cake celebrating a same-sex marriage had nothing to do with animus based on sexual orientation; it had everything to do with his unwillingness to express a message that violated his religious beliefs. His declination was no different than it would have been if Craig and Mullins had asked him to create a cake expressing a message that was repugnant to his other religious beliefs, including a message that demeaned people based on their sexual orientation.

Allowing moral considerations to shape business practices is not a novel concept. The Colorado Civil Rights Commission itself has supported other cake artists in their refusal to create custom cakes with religious messages *criticizing* same-sex marriage, because to do so would conflict with the beliefs of those designers about marriage. Pet. App. 20a, 297a–331a. The Free Speech Clause should similarly protect Phillips' right not to be forced to promulgate through his artistry beliefs about marriage that conflict with his own.

The Commission's position appears to be that Phillips is free to decline expressing the government's message if he will simply stop designing wedding cakes altogether (something he has done during the pendency of this litigation) or perhaps move to another state. Taken to its logical conclusion, this kind of reasoning strips of any real meaning the Free Speech Clause's prohibition against government-compelled speech. It merely substitutes one sanction (exclusion from a significant portion of his livelihood as a baker) in place of another (civil damages and

injunction) as the method of government compulsion. Given the danger of the Court of Appeals' decision to the First Amendment's guarantee of free speech in the State of Colorado, this Court should reverse.

2. The individual right to refuse to express the government's preferred message is closely related to the right of association, which is derived from the First Amendment guarantees of speech, assembly, and petition. *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958). The "freedom to engage in association for the advancement of beliefs and ideas is [also] an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id.* And just as the right not to speak is inherent to the right of free speech, so too the freedom of association includes the right *not* to associate. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate.") (citation omitted).

That associational guarantee is also at issue here, because Phillips does more than create cakes that express a message: he is present at the wedding's festivities when delivering and setting up the cake, and he often interacts with the newly-married couple's family and friends. Pet. App. 280a. In other words, Phillips' voice is expressed through his artwork *and* through his actual association with the ceremony he has been asked to help celebrate.

The government should not force Phillips to associate with a ceremony that he considers a grave violation of God's law any more than it should force him to associate with a Halloween celebration, a college party that includes alcohol, or a protest that demeans individuals based on race, sex, or sexual

orientation. In such instances, he would not be refusing to create a cake out of animus toward college students, individuals who like Halloween, or protestors. He would be declining to associate himself with an event that violates his religious beliefs. When the government is allowed to penalize an individual's conscientious refusal to participate in what he considers to be a religious ceremony, it wounds the First Amendment and pluralism.

The counter-argument is that honoring Phillips' association right countenances discrimination against customers who identify as gay by preventing them from accessing markets for goods and services, just like the Jim Crow South. Columbia Law School even goes so far as to characterize claims to free speech and exercise in this context as arguments in favor of a "right to discriminate."[15] That argument might carry weight if there were any evidence to support it, but there is none. As explained by Andrew Koppelman, a strong advocate for sexual orientation antidiscrimination laws, "[h]ardly any of these cases [involving denial of goods or services] have occurred: a handful in a country of 300 million people. In all of them, the people who objected to the law were [like Phillips] asked directly to facilitate same-sex relationships, by providing wedding, adoption, or artificial insemination services, counseling, or rental of bedrooms. *There have been no claims of a right to simply refuse to deal with gay people.*" Andrew Koppelman, *A Zombie in the Supreme Court: The*

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[15] *E.g.*, Elizabeth Reiner Platt, Columbia Law School, *Georgia Governor Vetoes Right-To-Discriminate Bill—HB757* (Mar. 29, 2016 Blog Post), available at https://goo.gl/Yy2n7c.

Elane Photography *Cert Denial*, 7 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 77, 91–92 (2015) (emphasis added).

So, the claim instead must be the one the Court of Appeals adopted: simply choosing not to participate in the celebration of a same-sex marriage is akin to denying services based on animus against those with same-sex attractions. Pet. App. 21a. But Phillips' claim is not about a refusal to serve customers of one or another sexual orientation. He is not concerned about his customers' sexual inclinations or conduct. Phillips' refusal to create a cake celebrating a same-sex marriage ceremony is to avoid complicity in conduct that violates his deeply held religious beliefs.[16] This case does not involve sexual-orientation discrimination any more than an

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[16] It should go without saying that it is the *particular religious objector's* view of complicity that is controlling. It is legally irrelevant—and therefore unnecessary to address—whether Phillips' views align with the religious views of his local church, its broader denomination, our own Catholic Church, or any other religious entity. See *Thomas* v. *Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 715–16 (1981). And it is most certainly not for administrative agencies and courts to substitute their view of permissible cooperation for that of the objector. *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014) (the Court has "repeatedly refused" to arrogate to itself "the authority to provide a binding national answer to . . . religious and philosophical question[s]"); *Thomas*, 450 U.S. at 716 ("Court are not arbiters of scriptural interpretation."). See also *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.").

African-American baker's refusal to make a cake with a Confederate flag for a white customer involves racial discrimination. In either case, the Court should protect the right of the artist not to create expression for, and associate with, a ceremony that violates the artist's conscience.

3. These protections of speech and association are not just for individuals. The First Amendment also protects the freedom of institutions that serve the public and the most vulnerable members of society as a way of living faith through action in the public square. Affirming the Court of Appeals' decision here would negatively impact the freedom of these institutions to continue their public ministries.

Consider the case of Catholic Charities and other faith-based organizations that provide foster and adoption services to children who have lost their families or have been removed from them because of abuse or neglect. In Illinois, Massachusetts, and the District of Columbia, these faith-based organizations have been forced to shut down rather than comply with government mandates to place children with same-sex couples on the same basis as opposite-sex couples.[17] The closure of these venerable institutions did not do a single thing to help a child find a home, or a couple find a child. But forcing the institutions to give up their religious beliefs "or else" made already vulnerable children victims of the government's determination to force broader adoption of its own views about human sexuality. Indeed, it was the

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[17] See Sarah Torre & Ryan C. Anderson, *Adoption, Foster Care, & Conscience Protections*, Heritage Foundation Backgrounder No. 2869 (Jan. 15, 2014), available at https://goo.gl/qT8NHI.

most vulnerable children who suffered, because faith-based adoption agencies tend to have the most success in placing older children and children with disabilities.[18] That is because the agencies and the clients they serve take seriously their obligation to live out their religious beliefs in the public square.

A ruling against Phillips and Masterpiece Cakeshop in this case would endanger faith-based adoption agencies and other religious or religiously motivated organizations in future cases. Using a similar rationale, a state or local government could take the position that a group like March for Life, by virtue of its opposition to abortion, is engaged in sex discrimination and must instead promote the government's preferred message regarding the availability of government-subsidized abortion procedures whenever communicating its pro-life message. If that sounds farfetched, it is exactly what California has done in the context of pro-life pregnancy resource centers. See Petition for Certiorari, *Nat'l Inst. of Family & Life Advocates* v. *Becerra* (U.S. No. 16-1140). Such government regulation would have a devastating impact on March for Life and its freedom to communicate its distinctive viewpoint in the public square.

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[18] In 2012, Catholic Charities affiliates found permanent homes for 1,649 special needs or "hard-to-place" children, 52% of the 3,185 total adoptions completed. Mary L. Gautier & Carolyne Saunders, *Catholic Charities USA 2012 Annual Survey Final Report*, Georgetown University, Center for Applied Research in the Apostolate (Sept. 2013), p. 56, available at https://goo.gl/YwZvwc.

Or consider a Catholic bookstore that highlights materials promoting the Catholic Church's understanding of God's plan for marriage. Under the Commission's rationale, if a same-sex couple entered the store and was told the store could not provide them with materials promoting same-sex marriage, the bookstore could be held liable for a civil rights violation. Whether the government sanction is a fine, closure, compulsion to carry pro-same-sex-marriage literature in contradiction to its own views, or compulsion to drop out of the marriage debate entirely, freedom of speech has not been respected, and the First Amendment has been violated.

Similar problems would arise in innumerable contexts: a Catholic university that declines to provide married student housing to unmarried couples; a Catholic hospital that will not perform direct sterilizations; a religiously motivated counseling center that will only provide counseling to clients based on the Church's teachings regarding human sexuality. The Commission would sacrifice all these institutions—and their good works, and the well-being of the needy they serve—in the name of an unduly broad concept of "discrimination," an unduly narrow concept of freedom of religious speech and exercise, and an apparent disregard for the value of religious diversity and robust public debate. To follow this course would yield a gross misinterpretation of the First Amendment and result in the loss of immeasurable societal benefits. The Court should emphatically reject an approach to Free Speech jurisprudence that deprives religious and religiously motivated secular institutions of the ability to serve the public and the poor as charitable

institutions. The most vulnerable members of society would be the victims of such a ruling.

B. The Free Exercise Guarantee

If the Free Speech Clause does not protect Phillips' right to exercise his conscience, then surely the Free Exercise Clause must. Again, such protection is essential to human flourishing.

1. The Free Exercise Clause protects individuals and organizations of every faith and those of no faith at all. Whether Muslim or Christian, Jewish or Hindu, the right to exercise one's conscience is as universal a value as any the Constitution recognizes. It makes no difference that Masterpiece Cakeshop is owned by a Christian. The same arguments would apply if the owner belonged to any religion, or none.

Major religions widely emphasize that the practice of faith does not end when a religious believer leaves her home or place of worship. Rather, people of faith are called to live out their beliefs—including those about sex, marriage, and the family—in every aspect of their lives, including work.

For example, the Catechism of the Catholic Church instructs that "[b]y reason of their special vocation it belongs to the laity to seek the kingdom of God by engaging in temporal affairs and directing them according to God's will."[19] Catholics are called to bring their faith in Christ "to all their earthly activities and to their humane, domestic, professional, social and technical enterprises," by "gathering them into one *vital synthesis* with religious

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[19] Catechism of the Catholic Church ¶ 898 (1997).

values, under whose supreme direction all things are harmonized unto God's glory."[20]

We see a similar approach in Protestant denominations as well.[21] Likewise, Judaism[22] and Islam[23] do not limit the impact of their beliefs to their modes of worship, but instead apply them throughout their daily lives. Indeed, based on Islam's rules forbidding the charging of interest, an entire global industry (Islamic Finance) has been created to comply with these rules.[24]

2. The Free Exercise Clause also protects individuals and organizations regardless of the underlying substantive issue at stake. A ruling for Phillips and

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[20] *Gaudium et Spes*, ¶ 43 (1965). See generally A CATECHISM FOR BUSINESS: TOUGH ETHICAL QUESTIONS & INSIGHTS FROM CATHOLIC TEACHING (Andrew V. Abela, Joseph E. Capizzi, eds. 2014). In speaking to more than 7,000 Catholic business executives, Pope Francis instructed "You are called to live the fidelity to the demands of the Gospel and the social doctrine of the Church in the family, in work, and in society." Catholic Online, *What did the Pope just say to 7000 Catholic businessmen?*, available at https://goo.gl/RNwQzM.

[21] The Lutheran Church—Missouri Synod, *Life Library—Vocation* (2017), https://goo.gl/b7vx9r; Alister McGrath, *Calvin and the Christian Calling*, 1999 FIRST THINGS 94 (July 1999); ERLC, *SBC's Richard Land Testifies in Support of Workplace Religious Freedom Act* (Nov. 10, 2005), available at https://goo.gl/Qtjfpw.

[22] Talmud, Makkos 23b; see also Rabbi Moshe Chaim Luzzato, Derech Ha-Shem §§ 1:2:1–5.

[23] Oxford Islamic Information Centre, *Five Pillars of Islam*.

[24] Muhammad Ayub, *Understanding Islamic Finance* (1st ed. 2007).

Masterpiece Cakeshop would also vindicate the Jewish florist who believes it is religiously transgressive to participate in creating floral arrangements for a ceremony in which a Jew was converting to another religion, or for a wedding between a Jew and a member of another religion.

Such a ruling would also protect the Muslim website designer who refuses to create sites for pornography; the atheist who refuses to create signs proclaiming "Jesus Christ is Lord and King"; and the cake maker who refuses to express white-supremacist and anti-Muslim messages.

A ruling for Masterpiece would also help protect religious and religiously motivated organizations. Consider SB 1146, a California bill that narrowly avoided passage in the last California legislative session. If enacted, Christian colleges and universities, which need state grants to support disadvantaged students, would have to choose between abandoning those students or giving up both codes of student conduct reflecting religious beliefs about sexual identity and sexual relationships, and hiring faculty members based on a profession of faith. Legislators were willing to impose the latter restriction even though the Free Exercise Clause generally protects the right of a religious educational institution to select and manage its faculty based on religion. See *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171, 188 (2012) (when a state interferes with a religious organization's appointment of ministers, "the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments [and] also violates the Establishment Clause, which prohibits involvement in such eccle-

siastical decisions."); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) ("[W]e have recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school. . . . 'Religious authority necessarily pervades the school system.'") (citation omitted).

Or consider the response of the United States Solicitor General when asked whether a religiously motivated university or college could be stripped of its tax-exempt status if it opposed same-sex marriage on religious grounds. The Solicitor General candidly answered: "[I]t's certainly going to be an issue. I - - don't deny that."[25] The answer to that question should have been self-evident. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963).

Government regulation that forces a religious or religiously motivated organization to give up its beliefs, in order to participate in an otherwise generally available public benefit program like tax benefits for nonprofits, "imposes a penalty on the free exercise of religion that must be subjected to the 'most rigorous' scrutiny." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2024 (2017) (quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 546 (1993)). Such government compulsion is precisely what is at issue here.

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[25] Transcript of Oral Argument at 38, *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015) (U.S. No. 14-556).

3. This Court's reaffirmation that the Free Exercise Clause protects individuals and organizations not only in places of worship but also in the marketplace will enable the continuation of religiously motivated public works. And when religion flourishes, so does society. As noted above, the Church's efforts are responsible for a great many modern institutions– such as universities, hospitals, and charitable organizations of all kinds—that benefit everyone.

A leading expert on international religious demography and the socio-economic impact of restrictions on religious freedom has shown that religion annually contributes nearly $1.2 *trillion* of socio-economic value to the U.S. economy.[26] This contribution is equivalent to being the world's 15th largest national economy, placing religion in the United States ahead of 180 other countries and the combined annual revenues of the country's ten largest tech companies, including Apple, Amazon, and Google.[27] These contributions essentially fall into three categories: (1) $418 billion from religious congregations, (2) $303 billion from other religious institutions, and (3) $437 billion from faith-based, faith-related, or faith-inspired businesses.[28]

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[26] Brian J. Grim & Melissa E. Grim, *The Socio-Economic Contribution of Religion to American Society: An Empirical Analysis*, INTERDISC. J. RES. ON RELIGION (2016), available at https://goo.gl/8fdwfc; Brian J. Grim, *Religion's Socio-Economic Value in the U.S.* (Sept. 13, 2016), available at https://goo.gl/Yb53hE.

[27] *Id.*

[28] *Id.*

By declining to apply the Free Exercise Clause to protect religiously motivated conduct in the marketplace, this Court would essentially be clearing the way for large portions of the first two categories of contributions and the entirety of the third to be banished from our economy. Individuals and organizations motivated by sincere religious beliefs have shown their willingness to give up their right to participate in the public square rather than surrender their beliefs. Phillips was forced to write off making wedding cakes, which comprised 40% of his revenue. Barronelle Stutzman was willing to risk personal bankruptcy. See Petition for Writ of Certiorari, *Arlene's Flowers* v. *State of Washington* (U.S. No. 17-108). The Stormans family was prepared to give up their family business. See *Stormans, Inc.* v. *Wiesman*, 136 S. Ct. 2433 (2016) (Alito, J., dissenting from the denial of certiorari) ("If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern."). And Catholic Charities has shut down adoption services in Illinois, Massachusetts, San Francisco, and Washington, D.C.

There should be no need for such withdrawals from the marketplace if the Free Exercise Clause does indeed "guarantee[ ] the free *exercise* of religion, not just the right to inward belief (or status)." *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part) (citing *Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 877 (1990)). The Court of Appeals' decision should therefore be reversed.

II. The Common Good Is Best Served If Courts Show Deference to Individuals and Organizations Choosing to Exercise Their Consciences in Challenging Situations Implicating Their Religious Beliefs.

In a pluralistic society, the Court should apply the First Amendment to leave room for diversity in matters of conscience, particularly where the contested values are deeply held and where factual nuances matter. Consider the details of Barronelle Stutzman, the proprietor of Arlene's Flowers. U.S. No. 17-108 (petition pending). It is undisputed that Stutzman has no animosity toward or prejudice against people based on sexual orientation. She has employees who identify as gay, and they praise how she treats them. U.S. No. 17-108, Pet. App. 347a - 50a. She loves and respects all her customers, regardless of orientation. *Id.*, Pet. App. 306a–07a, 312a–13a.

And Stutzman lovingly served her customer and friend, Robert Ingersoll, for nearly 10 years. It was only when Ingersoll asked her to do something that she believed would violate Christ's law—participate in the celebration of a same-sex wedding—that she respectfully said no. She took Ingersoll's hand, told him she loved him, and explained that her relationship with Jesus Christ did not allow her to celebrate Ingersoll's wedding. The response was two civil-rights lawsuits and the prospect of losing her business and all her personal assets. Does such punishment comport with any reasonable understanding of the First Amendment and the common good?

Notably, professional rules against conflicts of interest illustrate how respect for conscience serves both the individual and the common good. For example, when a lawyer has a conflict of interest, rules of professional responsibility do not require her to continue in a representation. Quite the opposite, the rules actually *prohibit* her from doing so. See, *e.g.*, ABA Model Rule of Professional Conduct 1.7(a) (A "lawyer *shall not* represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interests exists if . . . (2) there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer.") (emphasis added). This is because the "lawyer's own interests should not be permitted to have an adverse effect on representation of a client." *Id.*, Comment 10. Accord, *e.g.*, AICPA Code of Professional Conduct Rule 102 ("In the performance of any professional service, [a Certified Public Accountant] shall maintain objectivity and integrity [and] shall be free of conflicts of interest.").

Such rules protect both service providers and their clients. On the one hand, they ensure that a professional will never be forced to sacrifice his or her personal integrity for the benefit of a client. On the other, they ensure that clients are served by zealous advocates whose performance will not be limited or curtailed in any way by a contrary personal interest or motivation. A client that receives services motivated only by government threat against the vendor is highly unlikely to receive the highest quality service.

There are certainly some social costs to such an approach. It requires Craig and Mullins to seek their wedding cake from another baker, and it forces the Wiccan to do the same when seeking a cake to celebrate Halloween. But that cost is far lower than that of: forcing proprietors to choose between providing services against their consciences and abandoning some or all of their livelihood; forbidding institutions of civil society from expressing a diversity of views on contested moral questions; and, in turn, skewing or stifling public moral debate on those questions, and reducing the number and range of voluntary associations dedicated to serving the common good.

As a country, we recognized the social value of genuinely accommodating such deeply held convictions in the aftermath of this Court's decision in *Roe* v. *Wade*, 410 U.S. 113 (1973). Mere months after the opinion issued, Congress passed on a bi-partisan basis the Church Amendment, named for Senator Frank Church, an Idaho Democrat. While *Roe* created a constitutional right to have an abortion, the Church Amendment protected the conscience rights of medical professionals and facilities not to participate in an abortion. Specifically, the Amendment ensured that health organizations receiving federal funding could not force their nurses or doctors to assist in or perform abortions. 42 U.S.C. § 300a-7.

Twenty years later, Congress passed and President Bill Clinton signed the Coats-Snowe Amendment. This law prohibits the government from discriminating against students in medical school who decline to perform abortions, and against post-graduate physician training (including residency)

programs that do not provide or refer for training in the performance of abortion. 42 U.S.C. § 238n.

In 2004, Congress acted again by passing the Hyde-Weldon Amendment. That law prohibits the government from discriminating against healthcare institutions and professionals that choose not to provide or refer for abortions. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3163, Div. F, § 507(d) (Dec. 8, 2004).[29]

In other words, people of good will have successfully balanced this Court's creation of a new constitutional right with individual and organizational conscience rights in the context of abortion. Accommodations for religious objectors are not only possible but also entirely healthy for the greater society when dealing with matters on which American citizens have widely differing religious and moral views, including fundamental rights this Court has identified in the U.S. Constitution.

The same is true here. The government should never penalize individuals like Phillips, or organizations like Catholic Charities, for their long-held beliefs about God's teachings regarding marriage. Instead, the First Amendment, properly construed, protects religiously motivated individuals and organizations who seek to discern the truth and then act on it, including in the public square. That protection is the only path by which people of good will on both sides of contentious issues may peacefully coexist and continue a constructive debate

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[29] The amendment has been included in every Labor/HHS appropriations bill since 2004.

and dialogue. Silencing entirely one side of the debate by government fiat is not only illegal but also generates needless conflict and, ultimately, is ineffective.

"Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice." *Obergefell*, 135 S. Ct. at 2638 (Thomas, J., dissenting). *Amici* respectfully request that the Court remove the restraints on religious practice that the Colorado Civil Rights Commission has placed on religious believers in the State of Colorado and reverse the Court of Appeals.

CONCLUSION

The judgment of the Colorado Court of Appeals should be reversed.

Respectfully submitted,

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